

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TROY STUBBS,

Plaintiff,

vs.

FRED JOHNSON,

Defendant.

NO. CV-08-304-RHW

ORDER DISMISSING FIRST AMENDED
COMPLAINT WITH PREJUDICE

1915(g)

Before the court is Plaintiff's First Amended Complaint (Ct. Rec. 15). Plaintiff, a prisoner at the Stafford Creek Corrections Center in Aberdeen, Washington, is proceeding *pro se* and has paid the full filing fee for this action. Plaintiff seeks monetary damages under the following provisions of the Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12131 and 12181, for injuries he sustained while housed at the Pend Orielle County Jail in Eastern Washington.

Because an amended complaint functions as a complete substitute for, rather than a mere supplement to, the original complaint, all grounds alleged in an original complaint which are not alleged in the amended complaint are waived. *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1546 (9th Cir. 1990) ("an amended pleading supersedes the original"); *King v. Atiyeh*, 814 F.2d 565 (9th Cir. 1987). Therefore, **IT IS ORDERED** the District Court Executive shall

ORDER DISMISSING FIRST AMENDED COMPLAINT WITH PREJUDICE -- 1

1 **TERMINATE** Defendants Mike Cress, Steve Higgins/Weeks and Pend Oreille
2 County Jail from this action.

3 **42 U.S.C. § 12181**

4 Plaintiff states he is bringing this action pursuant to 42 U.S.C.
5 § 12181. That subsection falls within Title III of the ADA, 42 U.S.C.
6 §§ 12181-12189. A party attempting to bring an action under Title
7 III, however, would only be entitled to injunctive relief. See 42
8 U.S.C. § 12188(a)(2) (1994) (providing for injunctive relief in
9 private suits by affected parties).

10 Therefore, even if Plaintiff properly brought his claims under 42
11 U.S.C. § 12181, his remedy would be limited to injunctive relief. Any
12 claim for injunctive relief is rendered moot by his transfer from the
13 Pend Oreille County Detention Center to the custody of the Department
14 of Corrections at the Stafford Creek Corrections Center in Aberdeen,
15 Washington. See *Johnson v. Moore*, 948 F.2d 517, 519 (9th Cir. 1990);
16 *Dilley v. Gunn*, 64 F.3d 1365, 1368 (9th Cir. 1995). Consequently,
17 Plaintiff has failed to state a cognizable claim for monetary relief
18 under 42 U.S.C. § 12181.

19 **42 U.S.C. § 12131**

20 Plaintiff contends he suffered bodily injury on May 31, 2006,
21 while in pre-trial confinement at the Pend Oreille County Detention
22 Center. At that time, Plaintiff states he was in a leg brace and
23 using crutches due to an ankle injury he had sustained two days
24 previously. He contends, despite previous requests by himself and
25 other inmates, T.V. cables were not properly maintained at the
26 Detention Center, causing him to trip and fall while stepping over a
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1 T.V. cable in a doorway on May 31, 2006. He contends Defendant
2 Johnson failed to act to properly maintain the T.V. cables and fix
3 electrical outlets, knowing the Detention Center was not in compliance
4 with the ADA.

5 It appears Plaintiff's claims are not appropriate under the ADA.
6 Title II of the ADA provides: "no qualified individual with a
7 disability shall, by reason of such disability, be excluded from
8 participation in or be denied the benefits of the services, programs,
9 or activities of a public entity, or be subjected to discrimination by
10 any such entity." 42 U.S.C. § 12132. Under 42 U.S.C. § 12131, a
11 "qualified individual with a disability" is defined as "an individual
12 with a disability who, with or without reasonable modifications to
13 rules, policies, or practices, the removal of architectural,
14 communication, or transportation barriers, or the provision of
15 auxiliary aids and services or the participation in programs or
16 activities provided by a public entity".

17 Contrary to Plaintiff's assertion, temporary incapacitation due
18 to a two-day-old ankle injury would not qualify Plaintiff as
19 "disabled" within the meaning of the ADA, 42 U.S.C. § 12101 et seq.
20 Plaintiff presents no facts stating this was a recurring incapacity,
21 or that any limitations associated with the ankle injury were of other
22 than a short duration. *See e.g., McDonald v. Department of Pub.*
23 *Welfare, Polk Ctr.* 62 F.3d 92, 96 (3d Cir. 1995). Plaintiff fails to
24 allege facts from which the court could infer he was discriminated
25 against by reason of a qualifying disability.

26 As set forth in the Order to Amend or Voluntarily Dismiss (Ct.
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1 Rec. 12), Plaintiff's allegations are the substance of an ordinary
2 slip-and-fall tort action based on negligence. Such allegations do
3 not rise to the level of a constitutional violation under 42 U.S.C. §
4 1983, Plaintiff's attempt to cloak them as ADA claims notwithstanding.

5 MEDICAL TREATMENT

6 Plaintiff brings this action against Defendant Johnson in his
7 official capacity, claiming he denied Plaintiff's requests to see a
8 doctor. Plaintiff asserts deliberate indifference to his serious
9 medical needs. While this claim appears to be one under 42 U.S.C. §
10 1983, state officials sued in their official capacity for damages are
11 not persons for purposes of § 1983. *See Arizonans for Official English*
12 *v. Arizona*, 520 U.S. 43, 69 n.24 (1997); *Flint v. Dennison*, 488 F.3d
13 816, 824-25 (9th Cir. 2007). Therefore, **IT IS ORDERED** Plaintiff's
14 Eighth Amendment claim against Defendant Johnson is **DISMISSED with**
15 **prejudice.**

16 The court cautioned Plaintiff if he chose to amend and the
17 Amended Complaint failed to state a claim upon which relief may be
18 granted, it would be dismissed. Therefore, for the reasons set forth
19 above and in the Order to Amend or Voluntarily Dismiss, **IT IS ORDERED**
20 Plaintiff's First Amended Complaint is **DISMISSED with prejudice** for
21 failure to state claims upon which relief may be granted. 28 U.S.C. §§
22 1915(e)(2) and 1915A(b)(1).

23 Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a
24 prisoner who brings three or more civil actions or appeals which are
25 dismissed as frivolous or for failure to state a claim will be
26 precluded from bringing any other civil action or appeal *in forma*
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1 *pauperis* "unless the prisoner is under imminent danger of serious
2 physical injury." 28 U.S.C. § 1915(g). Plaintiff is advised to read
3 the new statutory provisions under 28 U.S.C. § 1915. This dismissal
4 of Plaintiff's complaint may count as one of the three dismissals
5 allowed by 28 U.S.C. § 1915(g) and may adversely affect his ability to
6 file future claims.

7 IT IS SO ORDERED. The District Court Executive is directed to
8 enter this Order, forward a copy to Plaintiff at his last known
9 address, enter judgment, and close the file. The District Court
10 Executive is further directed to forward a copy of this Order to the
11 Office of the Attorney General of Washington, Criminal Justice
12 Division. IT IS FURTHER ORDERED any pending motions are DENIED as
13 moot.

14 DATED this 26th day of January 2009.

15 S/ Robert H. Whaley

16 ROBERT H. WHALEY
17 CHIEF UNITED STATES DISTRICT JUDGE
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